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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1990

RICHARD L. CHAPMAN, JOHN M. SCHOENECKER, and PATRICK BRUMM,

Petitioners,

v.

UNITED STATES OF AMERICA

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF THE DRUG POLICY FOUNDATION AND THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS AMICI CURIAE SUGGESTING REVERSAL

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INTEREST OF AMICI CURIAE

The Drug Policy Foundation is a privately funded, tax-exempt, nonprofit organization concerned with the development of rational solutions to current drug problems. Its national membership includes current and former law enforcement officials, physicians, scientists, drug abuse experts, leaders of the business community, and distinguished scholars active in all aspects of drug policy.

By sponsoring publications, conferences, and public education programs, the Drug Policy Foundation provides an interdisciplinary forum for the development of sound drug policy and practice. The Foundation also participates in state and federal court proceedings to encourage rational interpretation of state and federal drug laws.

At issue in this case are the meaning and rationality of the penalty structure Congress has enacted for federal drug offenses. The Drug Policy Foundation offers its assistance to the Court because it believes that basing the penalties for drug offenses on a factor as arbitrary as the weight of the carrier vehicle would serve no rational purpose and would undermine the goals of proportionality and consistency in sentencing.

The National Association of Criminal Defense Lawyers (NACDL), including its statute affiliates, is a nationwide organization comprised of over 25,000 attorneys who are actively engaged in defending persons charged with criminal offenses and who are concerned with the proper administration of the criminal justice system.

NACDL was founded in 1958 to preserve the adversary system of justice; to maintain and foster independent and able criminal defense lawyers; and to ensure justice and due process to persons accused of crime. It pursues these goals through a variety of educational and public service activities, including national training programs, publication, committee activities, legislative action and by appearing as amicus curiae in cases presenting issues of significance

to the American criminal justice system. Significant cases in which NACDL has recently filed briefs amicus curiae in this Court include Caplin & Drysdale, Chartered v. United States, 109 S. Ct. 2646 (1989); United States v. Monsanto, 109 S. Ct. 2657 (1989); and Mistretta v. United States, 109 S. Ct. 647 (1989).

The case before the Court raises questions about the proper interpretation of a mandatory sentencing scheme and implicates the constitutional right to fairness in sentencing. The Amicus Curiae Committee of the NACDL has discussed this case and decided that the issues it presents are of such importance to the administration of the criminal justice system that NACDL should take a position and offer its assistance to the Court.

This brief is filed with the written consent of all parties.

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interpretive issue now before the Court. If a narrow reading of the statute and Guidelines, is even fairly possible", or if there is a "reasonable doubt" as to what Congress intended, then such a narrow reading must be adopted by this Court pursuant to the well established canons of statutory construction that require courts to avoid constitutional conflicts and to construe criminal statute with lenity. And even if a literal reading the statutory language unambiguously precluded the construction advocated here, the doctrine of avoiding "absurd" results would nonetheless mandate that construction.

Finally, if the Court adopted the government's construction of the statute and Guidelines, such a construction would render the relevant provisions unconstitutional under the Equal Protection component of the Due Process Clause of the Fifth Amendment, because there would exist no conceivable "rational relationship" between the widely variable weights of different LSD carriers and any legitimate punitive purpose.

ARGUMENT

I. CONGRESS DID NOT INTEND THE PHRASE "MIXTURE OR SUBSTANCE CONTAINING A DETECTABLE AMOUNT OF" LSD TO INCLUDE CARRIERS.

A. The language and structure of the statutory sentencing scheme indicate that Congress did not intend punishment for trafficking in controlled substances to depend upon the weight of carriers or similar paraphernalia.

The penalty scheme for offenses involving the domestic manufacture or distribution of controlled substances is set out in 21

U.S.C. § 841(b). The statute establishes sentencing ranges of different levels of severity, based in part on the weight of the "mixture or substance containing a detectable amount of" the controlled substance involved. For a first offense involving a schedule I or II controlled substance, the statute authorizes imprisonment within one of three ranges -- not more than 20 years, 5 to 40 years; and 20 years to life[1] -- depending on the nature of the controlled substance and weight of the "mixture or substance" involved.

The structure of § 841(b) evidences a clear congressional design to achieve both proportionality and consistency in sentencing. Heightened penalties are imposed for offenses involving greater amounts of a "mixture or substance containing a detectable amount of" a particular controlled substance. (The individual who sells in 10 grams of a mixture or substance containing LSD receives a harsher penalty than the individual who sells in 1 gram of a mixture or substance containing LSD.) The weight-based equivalences Congress has drawn between offenses involving different controlled substances further demonstrates Congress' intent to assure that equally culpable individuals receive similar sentences. (The individual who sells 1 gram of a mixture or substance containing LSD receives the same sentence as the individual who sells 100 grams or more of a mixture of substance containing heroin.) This statutory design is consistent with Congress' overall plan to achieve proportionality and consistency in sentencing. See 28 U.S.C. § 991(b)(1)(B) (creating Sentencing Guidelines system); 18 U.S.C. § 3553(a)(6) (directing courts to "avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct").

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[1] The statute imposes heightened penalties for repeat offenders and for those whose conduct results in death or serious bodily injury. 21 U.S.C. § 841(b).

The Federal Sentencing Guidelines, which determine the sentence in a particular case within the range mandated by Congress, incorporate the weight-based equivalencies set out in section 841(b). U.S.S.G. § 2D1.1, comment (n.10) ("The Commission has used the sentences provided in, and equivalences derived from, the statute.") The Drug Quantity Table assigns a base offense level based on the "weight of any mixture or substance containing a detectable amount of the controlled substance." U.S.S.G. § 2D1.1(c). The accompanying commentary specifies that the phrase "'mixture or substance' as used in this guideline has the same meaning as in 21 U.S.C. § 841." U.S.S.G. § 2D1.1, comment (n.1).

The language and structure of this statutory scheme demonstrate that Congress did not intend sentences imposed for drug trafficking under section 841(b) to be based on the weight of carrier media or similar paraphernalia. Paraphernalia used to facilitate the handling and administration of a controlled substance cannot reasonably be thought to be part of the "substance containing" the illegal drug or an ingredient in the drug "mixture." Courts have routinely concluded that Congress did not intend the phrase "mixture or substance" to include paraphernalia in which the controlled substance is contained. See, e.g., United States v. Luster, 896 F.2d 1122, 1127 (9th Cir. 1990) (section 841(b)(1)(A)(iii) includes "the weight of the entire mixture or substance without packaging") (emphasis added); United States v. Smith, 840 F.2d 886, 888 (11th Cir.) (calculation of the weight of crack cocaine "mixture" did not include the weight of the 60 vials), cert. denied, 448 U.S. 859 (1988); Thomas v. United States, 239 F.2d 7, 8 (10th Cir. 1956) (excluding weight of capsule in which

heroin was contained). See also United States v. Marshall, 908 F.2d at 1317 ("That phrase cannot include all 'carriers.'").[2]

The same analysis applies to vehicles used to carry LSD. The synthetically produced compound LSD is odorless, colorless, tasteless, and produces hallucinogenic effects in extremely small doses.[3] These dosage units are far too small to handle and are therefore adhered to a carrier — typically paper, gelatin capsules or sheets, or sugar cubes — for delivery and consumption. United States v. Marshall, 908 F.2d 1312, 1315 (7th Cir. 1990) (en banc); 706 F. Supp. 650, 652 (N.D. Ill. 1989)[4] The LSD carrier, which facilities the distribution and administration of measured doses of LSD, performs the same function as gelatin capsules commonly

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[2] As part of the Anti-Drug Abuse Act of 1986, Congress also enacted a drug paraphernalia act prohibiting and punishing the sale of "any product, or material of any kind which is primarily intended or designed for use in manufacturing, compounding, converting, concealing, producing, processing, preparing, injecting, ingesting, inhaling, or otherwise introducing into the human body a controlled substance." 21 U.S.C. § 857(b). The penalties Congress established for illegal sale of drug paraphernalia — imprisonment for not more than three years, a fine of not more than $100,000, and forfeiture — are not based on the weight of the illegal paraphernalia. The most logical was to harmonize the language of the paraphernalia statute with that of 841(b) is to read the phrase "mixture or substance" to exclude the vehicles used for handling or ingestion of the illegal substances.

[3] L. Grinspoon & B. Bakalar, Psychedelic Drugs Reconsidered 77 (1979); E. Brecher, Licit & Illicit Drugs: The Consumers Union Report on Narcotics, Stimulants, Depressants, Inhalants, Hallucinogens & Marijuana--Including Caffeine, Nicotine and Alcohol 347 (1972). The U.S. Sentencing Commission estimates that the average dose weighs 50 micrograms (millionths of a gram). U.S.S.G. § 2D1.1, comment (n.11) (Typical Weight Per Unit Table).

[4] Paper methods include "blotter (impregnated paper) and microdot (dried droplets on paper)." L. Grinspoon & J. Bakalar, Psychedelic Drugs Reconsidered at 77. See The NNICC Report 1989 at 88 ("blotter acid and microdots continued to be the primary forms encountered"); P. Stafford, Psychedelics Encyclopedia at 15, 73-75 (cataloguing the use of microdots, gelatin squares, blotters, ampules, sugar cubes)" "sugar cubes"); E. Brecher, Licit & Illicit Drugs at 367.

used by manufacturers and pharmacists to facilitate the delivery and administration of precisely measured dosages of lawfully purchased substances.[5]

A carrier, which functions as a drug delivery system, is different in nature and function from an agent that is mixed with a drug to dilute it or increase its apparent weight or bulk. Drug traffickers commonly adulterate the drugs they sell with less potent or even inert substances to increase the apparent quantity of the drug and, derivatively, their weight-based profits.[6] A similar phenomenon occurs in the LSD trade, albeit less frequently, when LSD tartrate is mixed with less potent substances such as phencyclidine (PCP) or methamphetamine crystals (speed) before delivery to the consumer.[7] By no stretch of the imagination, however, can the carrier medium be seen as part of the "substance or mixture," because, as the government has stipulated, LSD is sold "without

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[5] Similarly, sugar cubes have been used as a vehicle for administering the Sabin Polio vaccine. J. Smith, Patenting The Sun: Polio and the Salk Vaccine 149 (1990). Carriers that facilitate the administration of a measured dose also reduce the risk of accidental overdose. See A. Hoffman, LSD: My Problem Child at 71-73 (discussing the risks associated with preparations of LSD where the dosage is not controlled).

[6] E. Brecher, Licit and Illicit Drugs at 96-98); 1989 NNICC Report at 7 (reporting that "cutting agents were used to compensate for the perceived shortage" of cocaine "fueled by the many, well-publicized media reports of multiple seizures and other successful law enforcement initiatives in both the United States and Latin America during the latter half of 1989").

[7] LSD tartrate is a salt of LSD resulting from the combination of LSD and tartaric acid. A. Hoffman, LSD: My Problem Child 72 (1979); See 132 Cong. Rec. S. 9522 (July 23, 1986) (Statement of Sen. Hawkins) (noting the use of mixtures of LSD, PCP, and crack cocaine); P. Stafford, Psychedelics Encyclopedia 12-14 (1977) (1973 study of 405 samples of black market LSD reported 91.6% were pure LSD, 3.4% had no drug at all, 3% were actually dimethoxyamphetamine (DOM), PCP and other drugs, and 2% had DOM, PCP, and methamphetamine in addition to LSD); E. Brecher, Licit and Illicit Drugs at 376 (noting that "some black-market suppliers adulterated their LSD with a variety of substances, including amphetamines").

regard to the weight of the carrier that contains that dosage." Pet. Add. 32A; 908 F.2d at 1330 (Cummings, J. dissenting). The carrier medium functions solely as the delivery vehicle and is not part of the "mixture or substance" sold. Blotter paper, sugar cubes, and gelatin squares containing LSD are best viewed "as carriers, like the package in which a fifth of liquor is sold." 908 F.2d at 1335 (Posner J., dissenting). If the phrase "mixture or substance" is to be given the same meaning in cases involving LSD as elsewhere in the statutory penalty scheme, it must be interpreted to exclude the weight of the carrier vehicle.

This was the conclusion reached by Judges Posner and Cummings in dissents from the decision below; by Judge Gesell in United States v. Healy, 729 F. Supp. 140, 142 (D.D.C. 1990), and also by the district courts in United States v. Hanlin, No. 90-00006-01 (W.D. Pa), appeal pending (4th Cir. 1990); and United States v. Mendoza-Macias, No. 39-0932-T (S.D. Ca. 1990), appeal pending (9th Cir. 1990) (all concluding that the paper carrier was not part of a "mixture or substance containing a detectable amount of" LSD). A mixture, as Judge Gesell explained, is "'a coexistence of different ingredients or of different groups or classes of things mutually diffused through each other." 729 F. Supp. at 142 (citing 9 Oxford English Dictionary 921 (1989)). See Steadman's Medical Dictionary 882 (24th ed. 1982) (defining "mixture" as "[a] mutual incorporation of two or more substances, without chemical union, the physical characteristics of each of the components being retained"). Cocaine cut with lactose is a "mixture," but "LSD and blotter paper are not commingled in the same way as cocaine and lactose." 908 F.2d at 1317. A carrier containing or holding a controlled substance is not a "mixture," because there is no "mutual incorporation." Like a postage stamp on an envelope, LSD adhered to a carrier is not a "mixture" in the ordinary sense of the word.

Judges Posner, Cummings, and Gesell were also correct in concluding that blotter paper carrying LSD is not a "substance containing" LSD within the meaning of the statute. A "substance" is "a species of matter of definite chemical composition," or "any particular kind of corporeal matter." 729 F. Supp. at 142 (citing 17 Oxford English Dictionary 64 (1989). LSD and carrier paper -- which do not react chemically with each other and do not form a "particular" matter -- do not fall within the meaning of the word substance. The Marshall majority agreed with this conclusion, reasoning that the statutory "phrase cannot include all carriers. One gram of crystalline LSD in a heavy glass bottle is still only one gram of 'statutory LSD.' So is a gram of LSD being 'carried' in a Boeing 747." 908 F.2d at 1317.

The conclusion that the phrase "mixture or substance" does not include blotter paper or other carriers is further supported by the overall structure of the mandatory sentencing scheme. Since the nature of the carrier medium does not affect the price or potency of substance it delivers, carrier vehicles vary tremendously in size and weight. In the present case, the LSD to paper ratio ranged from 5.7 milligrams to 9.6 milligrams per dose of LSD. Marshall, 906 F.2d at 1316 n.1. In United States v. McGeehan, 824 F.2d 677, 680 n.4 (8th Cir. 1987), the gelatin carrier weighed 2.25 milligrams per dose. A sugar cube weighs around 2 grams. Marshall, 906 F.2d at 1333. These variances are quite significant in light of the fact that the average dose of LSD is .05 milligrams. U.S.S.G. § 2D1.1, comment (n.11). At the extreme, commentators report that LSD has been distributed on animal crackers,[8] and that "painting it onto the fingernails and impregnating the cloth of a man's suit have been

[8] A. Ludwig & J. Levine, Patterns of Hallucinogenic Drug Abuse, 191 JAMA 93 (1965), (cited in Organization and Coordination of Federal Drug Research and Regulatory Programs: LSD, Hearings Before the Subcommittee on Executive Reorganization of the Committee on Government Operations 89th Cong., 2nd Sess. 149 (Exhibit 11) (1966).

used for smuggling."[9] Since the weight of the average LSD dose is far lighter than any carrier, the weight of the carrier, if it is taken into account, will determine the sentence. 906 F. 2d at 1333 (Posner, J., dissenting) ("Congress might as well have said: if there is a carrier, weigh the carrier and forget the LSD."). Introducing a factor as arbitrary and variable as the weight of the delivery vehicle into the sentencing calculation would obviously destroy the weight-based equivalencies established by Congress. Since, as the government concedes, LSD is sold by dose, "without regard to the weight of the carrier that contains that dosage," Pet. App. 32A, the weight of a particular carrier bears no relation to amount of LSD sold or to the defendant's culpability. Including the carrier medium as part of the "mixture or substance" that the determines severity of the sentence would therefore run contrary to the proportionality and consistency Congress attempted to build into its sentencing scheme.

Finally, excluding the weight of the carrier medium from the weight-based sentencing calculation is also consistent with the overall structure of the Federal Sentencing Guidelines. The commentary to the Guidelines Drug Quantity Table contains a Typical Weight Per unit Table, to be used to calculate the base offense level in cases where the number of doses, but not the total weight of the "mixture or substance," is known. U.S.S.G. § 2D1.1(c), comment (n.11). The listed dosage weight for LSD -- .05 milligrams -- clearly excludes the weight of any carrier medium. Excluding the weight of the carrier paper when the weight of the "mixture or substance" is estimated, but including the weight of the carrier when the weight of the "mixture or substance" is known, makes no sense. Interpreting the Guidelines in such a manner would result in drastically different base offense levels for individuals distributing the same number of doses contained in the

[9] L. Grinspoon & J. Bakalar, Psychedelic Drugs Reconsidered 77 (1979).

same type of carrier. The only way to harmonize these guidelines provisions is to interpret them all to exclude the weight of carriers.

The Government, in its response to the petition for certiorari, argues that excluding the weight of the carrier from the sentencing calculation is "contrary to the plain language of the statute and the Sentencing Guidelines." Op. Cert. 5. This claim does not hold up under scrutiny, however. While changes made in the Anti-Drug Abuse Act of 1986 -- most notably the shift from LSD to "mixtures or substances containing" LSD, and the application of different penalty ranges for offense involving PCP and offenses involving "a mixture or substance containing" PCP[10] -- show that Congress intended to include cutting agents and adulterants (LSD mixed with amphetamines, or cocaine mixed with mannitol), as well as "pure" controlled substances it does not suggest that Congress intended to include carriers (gelatin capsules, blotter paper, sugar cubes, or glass vials). See Marshall, 908 F.2d at 1317. In cases involving heroin and cocaine, the statutory language has been interpreted to include dilutants and adulterants added to drug mixtures sold by weight but to exclude the carrier or container. See, e.g., United States v. Luster, 896 F.2d 1122, 1127 (9th Cir. 1990); United States v. Smith, 840 F.2d 886, 888 (11th Cir.), cert. denied, 448 U.S. 859 (1988). Similarly, while the phrase "mixture or substance containing" LSD includes LSD and its salts and mixtures of LSD and its salts with substances like methamphetamine crystals (speed), PCP, or crack cocaine, it does not include the carrier. Since LSD is often combined with tartaric acid and sometimes adulterated with amphetamines and other similar substances, interpreting the phrase "mixture or substance" to exclude the weight of the carriers would

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[10] 21 U.S.C. § 841(b)(1)(A)(iv) refers to "100 grams or more of phencyclidine (PCP) or 1 kilogram or more of a mixture or substance containing a detectable amount of phencyclidine (PCP). Similarly, 21 U.S.C. § 841(b)(1)(B)(iv) refers to offenses involving "10 grams or more of phencyclidine (PCP) or 100 grams or more of a mixture or substance containing a detectable amount of phencyclidine(PCP)."

not leave the phrase "without a referent." See United State v. Marshall, 908 F.2d at 1335 (Posner, J., dissenting).

Moreover, while several courts have agreed that statutory language commands that the weight of the carrier be included in the sentencing calculation, these same courts have disagreed about the precise meaning of the statutory language and have been unable to articulate a workable definition. The Seventh Circuit majority ruled that LSD and blotter paper are not a "substance" but are a "mixture" so long as the LSD is "inside the paper" rather than "on the blotter paper." 908 F. 2d 1312. This interpretation is contrary to the reasoning of the Marshall district court that LSD on blotter paper is not a "mixture," but a "substance." 706 F. Supp. 650. The Court of Appeals never defined a "mixture," other than to say that it is more inclusive than "substance." 908 F.2d at 1317. The district court determined that "mixture" is the more inclusive term. 706 F. Supp. at 653.

The alternate interpretation of the statutory language applied by several courts and advanced by the Government --that the phrase "substance containing" a controlled substance includes any "distinguishable kind of physical matter" containing a controlled substance"[11] -- is equally unworkable and obviously not what Congress intended. This broad interpretation of the word "substance" was rejected by both the majority and the dissenters in Marshall because it would include all containers, from the "heavy glass bottle" to the "Boeing 747." 908 F.2d 1312. Punishing LSD offenders based on the weight of the blotter paper "would be like

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[11] Op. Cert. 9; United States v. Bishop, 894 F.2d 981 (8th Cir. 1990); United States v. Daly, 883 F.2d 131 (4th Cir. 1989), cert. denied, 110 S. Ct. 2622 (1990); United States v. Taylor, 868 F.2d 125 (5th Cir. 1989) (all holding that blotter paper is a "substance containing LSD"). See United States v. Larsen, 904 F.2d 562 (10th Cir. 1990), petition for cert. pending, No. 90-5509; United States v. Elrod, 898 F.2d 60 (6th Cir. 1990) (holding that LSD and blotter paper constitute a "mixture or substance containing" LSD).

same type of carrier. The only way to harmonize these guidelines provisions is to interpret them all to exclude the weight of carriers.

The Government, in its response to the petition for certiorari, argues that excluding the weight of the carrier from the sentencing calculation is "contrary to the plain language of the statute and the Sentencing Guidelines." Op. Cert. 5. This claim does not hold up under scrutiny, however. While changes made in the Anti-Drug Abuse Act of 1986 -- most notably the shift from LSD to "mixtures or substances containing" LSD, and the application of different penalty ranges for offense involving PCP and offenses involving "a mixture or substance containing" PCP[10] -- show that Congress intended to include cutting agents and adulterants (LSD mixed with amphetamines, or cocaine mixed with mannitol), as well as "pure" controlled substances it does not suggest that Congress intended to include carriers (gelatin capsules, blotter paper, sugar cubes, or glass vials). See Marshall, 908 F.2d at 1317. In cases involving heroin and cocaine, the statutory language has been interpreted to include dilutants and adulterants added to drug mixtures sold by weight but to exclude the carrier or container. See, e.g., United States v. Luster, 896 F.2d 1122, 1127 (9th Cir. 1990); United States v. Smith, 840 F.2d 886, 888 (11th Cir.), cert. denied, 448 U.S. 859 (1988). Similarly, while the phrase "mixture or substance containing" LSD includes LSD and its salts and mixtures of LSD and its salts with substances like methamphetamine crystals (speed), PCP, or crack cocaine, it does not include the carrier. Since LSD is often combined with tartaric acid and sometimes adulterated with amphetamines and other similar substances, interpreting the phrase "mixture or substance" to exclude the weight of the carriers would

[10] 21 U.S.C. § 841(b)(1)(A)(iv) refers to "100 grams or more of phencyclidine (PCP) or 1 kilogram or more of a mixture or substance containing a detectable amount of phencyclidine (PCP). Similarly, 21 U.S.C. § 841(b)(1)(B)(iv) refers to offenses involving "10 grams or more of phencyclidine (PCP) or 100 grams or more of a mixture or substance containing a detectable amount of phencyclidine(PCP)."

not leave the phrase "without a referent." See United State v. Marshall, 908 F.2d at 1335 (Posner, J., dissenting).

Moreover, while several courts have agreed that statutory language commands that the weight of the carrier be included in the sentencing calculation, these same courts have disagreed about the precise meaning of the statutory language and have been unable to articulate a workable definition. The Seventh Circuit majority ruled that LSD and blotter paper are not a "substance" but are a "mixture" so long as the LSD is "inside the paper" rather than "on the blotter paper." 908 F. 2d 1312. This interpretation is contrary to the reasoning of the Marshall district court that LSD on blotter paper is not a "mixture," but a "substance." 706 F. Supp. 650. The Court of Appeals never defined a "mixture," other than to say that it is more inclusive than "substance." 908 F.2d at 1317. The district court determined that "mixture" is the more inclusive term. 706 F. Supp. at 653.

The alternate interpretation of the statutory language applied by several courts and advanced by the Government --that the phrase "substance containing" a controlled substance includes any "distinguishable kind of physical matter" containing a controlled substance"[11] -- is equally unworkable and obviously not what Congress intended. This broad interpretation of the word "substance" was rejected by both the majority and the dissenters in Marshall because it would include all containers, from the "heavy glass bottle" to the "Boeing 747." 908 F.2d 1312. Punishing LSD offenders based on the weight of the blotter paper "would be like

[11] Op. Cert. 9; United States v. Bishop, 894 F.2d 981 (8th Cir. 1990); United States v. Daly, 883 F.2d 131 (4th Cir. 1989), cert. denied, 110 S. Ct. 2622 (1990); United States v. Taylor, 868 F.2d 125 (5th Cir. 1989) (all holding that blotter paper is a "substance containing LSD"). See United States v. Larsen, 904 F.2d 562 (10th Cir. 1990), petition for cert. pending, No. 90-5509; United States v. Elrod, 898 F.2d 60 (6th Cir. 1990) (holding that LSD and blotter paper constitute a "mixture or substance containing" LSD).

basing the punishment for selling cocaine on the combined weight of the cocaine and of the vehicle (plane, boat, automobile, or whatever) used to transport it or the syringe used to inject it or the pipe used to smoke it." 908 F.2d at 1332 (Posner, J., dissenting). One can not attribute to Congress an intent to include the weight of LSD carriers in the sentencing calculations but not vehicles used to deliver or ingest other controlled substances, especially since the weights of the various vehicles used to carry the tiny dosage units vary so dramatically.

The Government's reliance on the "plain language of the Sentencing Guidelines," Op. Cert. 5, is also misplaced. The Sentencing Commission thinks the phrase "mixture or substance" is "unclear" and has asked Congress to "clarify legislative intent as to whether the weight of the carrier should or should not be considered in determining the quantity of LSD mixture of punishment purposes." Letter from William W. Wilkins, Chairman of U.S. Sentencing Commission, to Sen. Joseph R. Biden, Jr., Chairman of the Senate Judiciary Committee (April 26, 1989) (cited in Marshall, 908 F.2d at 1318). See Healy, 729 F. Supp. at 142.

Clarifying legislation has been introduced but not acted upon by the full Congress. Senator Biden introduced, in a series of "technical amendments" to the Controlled Substances Act, language clarifying that the phrase " mixture or substance" does not include the carrier medium. The senator explained that the amendment would cure the inequity caused by federal courts that have included the LSD carrier medium in the sentencing calculation. Cong. Rec. S 12748 (daily ed. Oct. 5, 1989. The amendment was withdrawn before Congress had an opportunity to act on it.

More recently, as part of the Drug and Alcohol Abuse Treatment and Prevention Improvement Act of 1990, Senator Kennedy proposed that Section 841(b)(1) be amended to "clarif[y]" that "[i]n determining the weight of a "mixture or substance" under

this section, the court shall not include the weight of . . . the carrier upon which the controlled substance is placed or by which it is transported." 136 Cong. Rec. S 7069 (daily ed. May 24, 1990). The amendment was reported favorably by Labor and Human Resources Committee on September 27, 1990. In its report, the Committee noted the conflict that has arisen on this issue among the federal courts and stated that the Court of Appeals' decision in the present case concluding that Congress intended the carrier to be weighed was "erroneous[]." S. Rep. No. 101-476, 101st Cong., 2d Sess., at 64-65.

For the reasons stated above, amici believe that language and structure of drug penalty statute indicate that Congress did not intend to make sentences for LSD offenses depend on the weight of the carrier. Though the government claims that the "plain language" compels a contrary result, judicial and administrative attempts to interpret the language and legislative efforts to clarify it at the very least "refute[] the proposition that the language of the statute and the Guidelines 'couldn't be clearer.'" Marshall, 908 F.2d at 1329 (Cummings, J., dissenting). Even if this Court were to conclude that the language and structure of the statute and Guidelines do not compel the result urged here, the legislative history and well-established canons of statutory interpretation discussed below mandate that any ambiguity in the statutory language be resolved in favor of this result.

B. The legislative history of the Anti-Drug Abuse Act of 1986 supports the conclusion that Congress did not intend sentences for drug traffickers to depend on the weight of carrier media.

Congress' amendment of the Controlled Substances Act creating mandatory five-and-ten-year penalties based on the weight of the "substance or mixture containing a detectable amount of" the

controlled substance was part of the Anti-Drug Abuse Act of 1986, Pub. L. 99-570, 100 Stat. 3207 (1986). The Report of the House Judiciary Committee on an earlier version of these amendments reveals that Congress' purpose was to "focus" scarce law enforcement resources and to "distinguish drug traffickers by the quantities of drugs they were responsible for selling or smuggling:

> The Committee strongly believes that the federal government's most intense focus ought to be on major traffickers, the manufacturers or the heads of organizations, who are responsible for creating and delivering very large quantities of drugs. . .. A second level of focus ought to be on the managers of the retail level traffic, the person who is filling the bags of heroin, packaging crack into vials or wrapping PCP in aluminum foil, and doing so in substantial street quantities.

H.R. Rep. No. 845, 99th Cong., 2nd Sess., at 11-12 (1986).[12] This Committee report reveals that, after studying the "distribution patterns for these various drugs," Congress adopted a "market-oriented approach," imposing mandatory minimum sentences based on "the minimum quantity that might be controlled or directed by a trafficker in a high place in the processing and distribution chain." Id. at 12.

As the Committee Report makes clear, the penalties set out in section 841 are based on the weights of the "mixtures or substances" that are weighed in the drug market. Congress was apparently made aware of the use of cutting agents to increase the profits of individuals in the upper echelon of the distribution chain and

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12 The Committee was commenting on the Narcotics Penalties and Enforcement Act of 1986, which contained language different from that of the Anti-Drug Abuse Act of 1986 but was similar in that it prescribed heightened and mandatory sentencing ranges for major traffickers based on the weight of the drug mixtures involved.

therefore intended the phrase "mixture or substance" to include cutting agents commonly added to controlled substances to increase their weight. Since the market price of these mixtures is based upon the combined weight of the controlled substance and the cutting agent, Congress reasonably relied on the combined weight as an indication of role in the distribution scheme.

It is equally clear that, from a "market-oriented approach," Congress did not intend the phrase "mixture or substance" to include carrier media, whose weight plays no role in the drug market. Since Congress consulted with DEA agents and prosecutors about drug distribution patterns, Congress undoubtedly knew that LSD is "sold by the 'hit' without regard to the weight of the carrier that contains that dosage." Pet. Add. A32. Congress knew that "[n]either the price of those doses nor the number of purchasers of those doses will increase because the LSD is sold on blotter paper instead of in its granular or liquid form, and that a dealer selling LSD that weighs more because he has chosen to sell the drug on blotter paper will not be a more significant market participant than one who has chosen to sell the same number of doses in granular or liquid form." Marshall, 908 F.2d at 1330 (Cummings, J., dissenting). Basing the sentence in an LSD case on a factor as arbitrary as the weight of the vehicle would obviously undermine Congress' weight-based "market-oriented" approach to sentencing.

The contrary conclusion reached by the Chapman majority rests in part on the assumption that the bizarre results flowing from its interpretation of the penalty provision could be avoided by the wise exercise of prosecutorial discretion and selective use of the Continuing Criminal Enterprise Statute. Marshall, 908 F.2d at 1325 ("Congress may count on prosecutorial discretion to take care of the absurd cases ... and it has created the CCE Act to take care of Mr. Big.") The Committee Report indicates that Congress rejected that assumption:

> One of the major goals of this bill is to give greater direction to the DEA and the U.S. Attorneys on how to focus scarce law enforcement resources. Up until 1984 the controlled substances law did not distinguish drug traffickers by the quantities of the drugs they were responsible for selling or smuggling. The only basis for a heightened sentence was when the defendant operated a continuing criminal enterprise (21 U.S.C. 848).

H.R. Rep. No. 845, 99th Cong., 2nd Sess, at 11. Congress was well aware of the Continuing Criminal Enterprise statute, thought that it had not accomplished proportionality in prosecution and sentencing, and established a new weight-based market-oriented sentencing scheme to solve — and not to exacerbate — these problems.

II. WELL-ESTABLISHED PRINCIPLES OF STATUTORY CONSTRUCTION MANDATE THE ADOPTION OF AMICI'S CONSTRUCTION OF THE STATUTE AND GUIDELINES

In Part I of this Brief, amici have argued that the best construction of Congress' intent, based on the language, structure, and legislative history of the statute and Guidelines, is that the carrier medium on which LSD is adhered was not meant to be part of the weight of the "mixture or substance containing a detectable amount" of the drug for sentencing purposes. Even if this construction were not the best one, however, its adoption would nonetheless be compelled if the import of the statute and Guidelines were at all ambiguous by well-established canons of statutory construction.

A. The rule of avoiding constitutional conflicts mandates the adoption of amici's construction of the statute and Guidelines.

A venerable rule of statutory construction requires that statutes be construed to avoid serious doubts about their constitutionality. This "cardinal principle" was already well-established in 1932 when this Court described it as follows: "When the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided." Crowell v. Benson, 285 U.S. 22, 62 (1932).[13]

This rule finds its source in the judiciary's respect for the legislature as a coordinate branch of government. By avoiding potential constitutional pitfalls in the interpretation of federal statutes, the Court "recognizes that Congress, like this Court, is bound by and swears an oath to uphold the Constitution." DeBartolo Corp. v. Florida Gulf Coast Building and Construction Trades Council, 485 U.S. 568, 575 (1988). Thus, the Court gives Congress the benefit of the doubt by presuming that Congress intended to legislate constitutionally. In addition, the rule respects the balance between the legislature and the judiciary by reserving the Court's authority to define the precise limits of legislative power — the authority to draw constitutional lines in the sand — for those cases in which the exercise of such authority is absolutely

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13 Accord Public Citizen v. Department of Justice, 109 S. Ct. 2558, 2572 (1989); Frisby v. Schultz, 487 U.S. 474 (1988); DeBartolo Corp. v. Florida Gulf Coast Building and Construction Trades Council, 485 U.S. 568, 575 (1988); St. Martin Evangelical Lutheran Church v. South Dakota, 451 U.S. 772, 780 (1981); NLRB v. Catholic Bishop of Chicago, 440 U.S. 490, 500-501 (1979); Erznoznik v. City of Jacksonville, 422 U.S. 205, 216 (1975); Broadrick v. Oklahoma, 413 U.S. 601, 613 (1973); Schneider v. Smith, 390 U.S. 17, 26 (1968); Machinists v. Street, 367 U.S. 740, 749-750 (1961).

necessary. Id. (The rule "reflects the prudential concern that constitutional issues not be needlessly confronted.") Finally, the rule respects the legislature's handiwork because it permits the Court "to preserve so much of the statute as can constitutionally be preserved" rather than send Congress "back to the drawing boards" with no effective enactment in the meantime. United States v. Marshall, 908 F.2d at 1337 (Posner, J., dissenting) (Given the choice between having the LSD statute and Guidelines declared unconstitutional and having a constitutional interpretation of them adopted by the Court, "we can be reasonably certain that Congress would have preferred the second course.") In applying the rule, courts are to adopt a saving construction if "reasonably possible," United States v. Shreveport Grain & Elevator Co., 287 U.S 77, 82 (1932), but should stop short of "perverting the purpose of a statute" or endorsing a construction of a statute that is "plainly contrary to the intent of Congress." Scales, 367 U.S. at 211; DeBartolo Corp., 485 U.S. at 575.

Application of the rule to the instant case mandates that the Court adopt amici's construction of the statute and Guidelines. First, the interpretation urged by amici is much more than "fairly possible." Amici has amassed significant support for the proposition that excluding the weight of the carrier medium from the weight of LSD for sentencing purposes is the best construction of the provisions at issue in this case, based on their language, structure and legislative history. See supra Part I.

Moreover, and most significantly, the construction urged by amici does not in any way "pervert" Congress' purpose or intent in enacting the statute and Guidelines. To the contrary, this construction is the only way to avoid perversion of Congress' evident and uncontested purposes. See Part I.B. supra.

The constitutional doubts raised about the statute and Guidelines under the interpretation urged by the government are evident and "serious." To base sentencing determinations, and

especially the applicability of mandatory minimum terms of imprisonment, on a factor as arbitrary as the weight of the LSD carrier medium would violate petitioners' right to due process of law — that is, their right to have Congress set their punishment based on a factor that bears some rational relationship to a legitimate governmental goal. See infra Part III (elaborating constitutional argument). Thus, proper application of the rule of avoiding constitutional conflicts mandates the result urged by amici.

B. The rule of lenity mandates the adoption of amici's construction of the statue and Guidelines.

The rule of lenity — "the rule that penal laws are to be construed strictly" — is at least as old as the rule of avoiding constitutional conflicts. See United States v. Wiltberger, 5 Wheat 76, 95 (1820) (Marshall, C.J.). This time-honored rule not only ensures fair notice to criminal defendants about the consequences of their actions, see Crandon v. United States, 110 S.Ct. 997 (1990), it also tends "to minimize the risk of selective or arbitrary enforcement and to maintain the proper balance between Congress, prosecutors, and courts." United States v. Kozminski, 487 U.S. 931, 952 (1988). So that its multiple purposes are served, the rule of lenity has been applied equally to the interpretation of substantive criminal statutes and to sentencing provisions.[14] In its most recent discussion of the application of the rule of lenity, this Court explained that lenity applies to "those situations in which a reasonable doubt persists about a statute's intended scope even after resort to 'the language and structure, legislative history, and motivating policies' of the statute." Moskal v. United States, 111 S.

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[14] See Hughey v. United States, 110 S. Ct. 1979, 1985 (1990); Bifulco v. United States, 447 U.S. 381, 387 (1980); Simpson v. United States, 435 U.S. 6, 14-15 (1978); Ladner v. United States, 358 U.S. 169, 178 (1958).

Ct. 461, 465 (1990) (quoting Bifulco v. United States, 447 U.S. at 387). If any of the traditional guides to interpretation listed by the Court give rise to a "reason to doubt" Congress' intent to sweep broadly, then lenity should apply and the statute should be construed narrowly.

As amici explained Part I, supra, each of the traditional guides to interpretation gives rise to a multitude of reasons to doubt Congress' intent to include the weight of the carrier medium in the weight the "mixture or substance containing a detectable amount" of LSD for sentencing purposes. Moreover, the harms sought to be avoided by the rule of lenity would materialize in this case if the rule were not applied. Given the lack of any workable definition of "mixture or substance," defendants cannot fairly be said to have notice of the statutory consequences of their actions. Prosecutors would be given enormous power to select which LSD offenders — some of whom may have small amounts of LSD but very weighty carriers — to charge under the mandatory minimum statutory provisions. Finally, if this Court were to inject a variable that has nothing to do with the defendant's culpability into a sentencing scheme intended to achieve proportionate sentencing, it would violate the "plain principle that the power of punishment is vested in the legislative, not in the judicial department." United States v. Wiltberger, 5 Wheat 76, 95 (1820) (Marshall, C.J.). In light of the reasons to doubt the government's interpretation of Congress' intent and the consequences of adopting such an interpretation, the rule of lenity should be applied to adopt amici's narrower construction of the provisions at issue in this case.

C. The rule of avoiding absurd results mandates the adoption of amici's construction of the statute and Guidelines.

The rule of avoiding constitutional conflicts and the rule of lenity are applicable only if "fairly possible" or if the statute at issue leaves a "reasonable doubt" as to its intended scope. Yet the Court of Appeals in the instant case found that the language of the statute and the Guidelines was so crystal clear as to leave no room for the operation of these rules. United States v. Marshall, 908 F.2d at 1318. This is also the position advanced by the government in support of the position below. Op. Cert. at 9 ("There is 'no ambiguity' in the language of the statute or the Guideline."). Yet even if the Court of Appeals and the government were correct that a literal reading of the statutory terms would preclude amici's construction, the third rule of interpretation compels the Court to look beyond the literal reading of the statute when such a reading would lead to "absurd or glaringly unjust results." Sorrells v. United States, 287 U.S. 435, 450 (1932).

This rule of construction was most succinctly stated by the Court in 1892:

> [F]requently words of general meaning are used in a statute, words broad enough to include an act in question, and yet a consideration of the whole legislation, or of the circumstances surrounding its enactment, or of the absurd results which follow from giving such broad meaning to the words, makes it unreasonable to believe that the legislator intended to include the particular act.

Church of the Holy Trinity v. United States, 143 U.S. 457, 459 (1892).[15] This Court most recently applied this rule in Public

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[15] Ancient common law examples of such absurdity include applying a statute banning obstruction of the mails against a sheriff who was executing a warrant to arrest the mail carrier for murder, or applying a medieval law against drawing blood in the streets against a physician who came to the aid of a passerby who fell down in the street in a fit. See id. at 2565-2566; United States v. Kirby, 7 Wall 482, 487 (1869). This rule of avoiding absurdity has been adhered to consistently by this

Citizen v. Department of Justice, 109 S. Ct. 2558 (1989), holding that although a literal reading of the Federal Advisory Committee Act would extend its application to the Justice Department's solicitation of the ABA Committee's views on prospective judicial nominees, such a result would be so unreasonable as to cast doubt on whether Congress truly intended it. In support of its holding, the Court quoted approvingly from Judge Learned Hand to the effect that while "the words used, even in their literal sense are the primary, and ordinarily the most reliable source of interpreting the meaning of any writing," nevertheless "it is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary; but to remember that statutes always have some purposes or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning." Id. at 2566 (quoting Cabell v. Markham, 148 F.2d 737, 739 (CA2), aff'd, 326 U.S. 404 (1945)).

In the instant case, if the words "mixture or substance" were read as the government contends they must be, the results would be patently absurd and plainly inconsistent with Congress' purposes of focusing scarce law enforcement resources and treating like offenders alike. The glaring absurdity created by such a reading is the keying of punishment for LSD traffickers to an arbitrary and meaningless detail — the weight of the carrier medium — which bears no relationship to the weight or number of doses of the drug, the market value of the drug, or the harm to society from its distribution. Such a reading would punish LSD traffickers in a manner grossly disproportionate to the treatment of purveyors of cocaine and heroin, see United States v. Marshall, 908 F.2d at 1335 (Posner, J., dissenting), and it would punish LSD traffickers whose

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Court throughout this century.See United States v. Wells Fargo Bank, 485 U.S. 351 (1988); Offshore Logistics, Inc. v. Tallentire, 477 U.S. 207 (1986); Griffin v. Oceanic Contractors, Inc., 458 U.S. 564, 571 (1982); United States v. American Trucking Assns., Inc., 310 U.S. 534, 543-544 (1940).

carrier weight was known more than LSD traffickers whose dosage alone was known — by a factor of more than 100. See 908 F.2d at 1315. These absurdities, so inconsistent with the general purposes of the provisions at issue, compel this Court to conclude that Congress did not intend what the government contends is the literal meaning of the statutory language.

III. THE GOVERNMENT'S INTERPRETATION OF THE STATUTE AND GUIDELINES WOULD RENDER THEM UNCONSTITUTIONAL.

If the Court were to reject amici's construction of the state and Guidelines urged in Parts I and II and to accept the government's reading, the statute and Guidelines would violate the constitutional guarantee of Equal Protection of the Laws, made applicable to the federal government through the Due Process Clause of the Fifth Amendment. See Bolling v. Sharpe, 347 U.S. 497 (1954). For a provision to withstand an Equal Protection challenge, the legislative classifications must be "rationally related to a legitimate governmental interest." Department of Agriculture v. Moreno, 413 U.S. 528, 533 (1973). This so-called "rational basis test" contains two substantive limitations on legislative choice: legislative enactments must implicate legitimate goals, and the means chosen by the legislature must bear a rational relationship to those goals. In an alternative formulation, the Court has explained that these limitations amount to a prescription that "all persons similarly situated should be treated alike." Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 439 (1985); see Plyler v. Doe, 457 U.S. 202, 216 (1982); Reed v. Reed, 404 U.S. 71, 76 (1971). As this Court has stated on many occasions, "the rational- basis standard is 'not a toothless one." Schweiker v. Wilson, 450 U.S.

221, 234 (1981) (quoting Mathews v. Lucas, 427 U.S. 495, 510 (1976)).[16]

Applying the rational basis standard to the instant case, it is apparent that the government's construction of the statute and Guidelines cannot pass constitutional muster. The problem lies not in the general goals of the statute and Guidelines, for it is surely a legitimate goal to set out a graduated schedule of punishment for drug traffickers. Rather, the problem lies in the lack of a rational relationship between the weight of the LSD carrier medium and any possible punitive purpose. The legislative history makes clear that Congress included the weight of the "mixture or substance containing a detectable amount" of a controlled substance in the weight of the drug for sentencing purposes because Congress sought to punish more severely those traffickers who dealt with larger quantities of controlled substances. See H.R. Rep. No. 845, 99th Cong., 2d Sess, at 11 (1986) (House Committee Report on the Anti-Drug Abuse Act of 1986). But for LSD, which the government has stipulated is sold by dose and not by weight, the weight of the carrier bears no relationship at all to the quantity of LSD possessed by a trafficker in the drug. Nor does the weight of the carrier medium bear any relation to any other conceivable punitive purpose — i.e., the number of doses of LSD available for distribution, the market value of the LSD, or the social harm caused by the distribution of the drug. Rather, the weight of the

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16 Its lack of "toothlessness" has been demonstrated over the years by its invalidation of a wide range of legislation. See, e.g., Hooper v. Bernalillo, 472 U.S. 612 (1985) (classification based on length of residency); Cleburne v. Cleburne Living Center, 473 U.S. 432 (1985) (classification based on mental retardation); Bearden v. Georgia, 461 U.S. 660 (1983) (sentencing classification based on indigence); Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982) (classification based on processing time by state Fair Employment Practices Commission); Jiminez v. Weinberger, 417 U.S. 628 (1974) (classification based on illegitimacy); Department of Agriculture v. Moreno, 413 U.S. 528 (1973) (classification based on relationship of household members); Department of Agriculture v. Murry, 413 U.S. 508 (1973) (classification based on claim of adult child as tax dependent).

carrier medium is a completely arbitrary factor, and the weight of the carrier is so much greater than the weight of the LSD adhered to it that the carrier weight alone — the arbitrary factor — that completely determines the punishment in LSD cases. "[T]o base punishment on the weight of the carrier medium makes about as much sense as basing punishment on the weight of the defendant." United States v. Marshall, 908 F.2d at 1333 (Posner, J., dissenting).

When this case was before the Court of Appeals, the Department of Justice was unable to advance any rational relationship between the weight of the carrier medium and the graduated scale of punishment for trafficking in LSD. Undeterred, the Court of Appeals posited three conceivable bases for determining punishment based on the weight of the carrier medium. In doing so, the Court of Appeals simply invented crucial "facts" to support its claims without a shred of record evidence. Moreover, the reasons advanced by the Court of Appeals, even with the invented facts, still fail to provide a rational justification for counting the weight of the carrier medium for sentencing purposes.

First, the Court of Appeals reasoned that "blotter paper apparently has contributed to the renewed success of the drug, making it easy to transport, store, conceal, and sell." 908 F.2d at 1324. There is absolutely no record evidence that LSD has had any "renewed success," or that if it has, such success was due to a sudden advent of blotter paper. See 132 Cong. Rec. S. 9049 (July 15, 1986) (statement of Sen. Hawkins) ("the use of ... LSD declined substantially in the past 5 years.") Along the same lines, the Court of Appeals furthered reasoned that because blotter paper is a "tool of the trade," it is rational to make the penalty for LSD trafficking "depend on a carrier that is essential to successful distribution of the drug." Ibid. It is reasonable since blotter paper, like other drug paraphernalia, can play an essential role in transportation, sale, or ingestion of controlled substances it is reasonable for Congress to

prohibit and punish its sale.[17] The problem is that it makes no sense to punish the possession of such paraphernalia by its weight. Congress might equally well seek to punish the use of glassine bags, plastic vials, tin foil packets, cigarette papers, pipes, and hypodermic needles — all of which play a role analogous to that of blotter paper. But it would be fundamentally irrational for Congress to punish the use of these implements by their respective weights because the relative weights of various packaging materials and other drug paraphernalia bear absolutely no correlation to the amount of drugs they can transport, contain, or conceal. Thus, the first basis offered by the Court of Appeals for counting the weight of the carrier medium fails miserably at achieving "rationality."

Second, the Court of Appeals reasoned that because "in 99% of all cases, LSD is sold in blotter paper," we need not "worry" about the anomalous treatment of sugar cubes and pure liquid LSD. Ibid. There is no record support for the "99%" figure, nor for the dual propositions that "[n]o one has been prosecuted for distributing LSD in sugar cubes in the last twenty years" and "no one has been prosecuted for possessing significant quantities of pure LSD in the last decade." Ibid. It is possible that there are no reported appellate decisions that reflect such prosecutions, but the Court of Appeals would have no way of knowing what actual prosecutions took place across the country, resulting in a variety of dispositions not necessarily subject to reported appellate decision, in the past twenty years.[18] Moreover, and perhaps more to the point, the Court of Appeals ignores evidence that there has been at least one prosecution recently for the possession of LSD on gelatin,

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[17] See 21 U.S.C. §857 (imposing punishments for sale of drug paraphernalia without regard to weight).

[18] See, e.g., United States v. Lowden, No. 89-00031-1 (D.Ma. 1989) appeal docketed, No. 90-1605 (CA 1990) (defendant possessed 5.7 grams of a liquid containing LSD in a vial).

which weighs considerably less than blotter paper. See United States v. McGeehan, 824 F.2d 677, 680 n.4 (8th Cir. 1987) (1,000 hits of LSD on gelatin weighed 2.25 grams, or 2.25 mg. per dose, as compared with 5.7 mg. per dose on petitioner Chapman's blotter paper and 9.6 mg. per dose on respondent Marshall's blotter paper). And it is quite clear from the reported appellate decisions regarding blotter paper alone that blotter paper ranges significantly in weight, with massive effects on sentencing. Marshall, 908 F.2d at 1316 n.1 Thus, defendants move in and out of the ambit of mandatory minimum sentences and are given widely varying base offense levels under the Guidelines based on the arbitrary weight of their carriers.

It is no answer to these pervasive anomalies to assert that "prosecutorial discretion" will take care of it. 908 F.2d at 1325. First, as we know from the legislative history of the Anti-Drug Abuse Act, Congress wanted the mandatory sentencing scheme to direct prosecutors, not the other way around. See Part I. B. supra. Second, while it is possible that prosecutorial discretion might take care of the truly ridiculous case of one hit of LSD on a 2-lb brick, it is clear that prosecutorial discretion is not taking care of the anomalies listed above. After all, these anomalies are present in this very case, given the significant disparity in the weight of the blotter paper among the codefendants now before the Court. The United States has exercised no prosecutorial discretion in this or any other case to prevent penalties from turning on the arbitrary weight of the carrier medium. And even if the United States did choose to exercise discretion and not charge certain cases under the mandatory minimum sentencing provisions, the prosecutor's discretion does not extend to changing the way base level offenses are computed under the Guidelines. Finally, either the statutory scheme is rational, or it is not. The possibility that the proper exercise of prosecutorial discretion might mitigate some of the

worst irrationality does not make the underlying scheme more rational or less arbitrary on its face.

Third and finally, the Court of Appeals posits the possibility that Congress included the weight of the carrier paper as part of the weight of the drug in order to avoid the difficulty of accurately weighing the drug itself, which is present only in "an exceedingly small quantity." 908 F.2d at 1325. Once again, there is absolutely no support in the record for the proposition that it is much more difficult to weigh LSD than to find out whether it is present on a carrier medium. Indeed, almost every reported decision at both the trial and appellate levels has included the weight of the LSD as well as the weight of the carrier medium. There is simply no reason to believe that such weights are difficult to obtain, either directly or by extrapolation. Moreover, and again perhaps more to the point, even if it were true that Congress believed that the actual weight of the LSD were too hard to obtain accurately, Congress would not be free to substitute for the weight of the drug itself the weight of something wholly unrelated to the quantity of the drug present. Congress is free to address any difficulty that might exist in accurately weighing LSD, but only in a manner that can be deemed rational. Indeed, the matter is handled by the Sentencing Guidelines, which set out the average weight per dose estimates to be used "if the number of doses ... but the weight of the controlled substance is known." U.S.S.G. § 2D1.1, comment (n.11). In contrast, the notion of substituting the weight of a carrier, which varies by factors at least as high as one hundred from the weight of the drug itself and from the weight of other carriers, is pure irrationality.

Perhaps recognizing that its purported "rational bases" for counting the weight of the carrier medium fail to rationalize the statute and Guidelines in any meaningful way, the Court of Appeals notes, with some exasperation, that irrationality is inevitable in any sentencing scheme: "Every attempt to make the system of

sentences 'more rational' carries costs and concealed irrationalities, both loopholes and unanticipated severity." 908 F.2d at 1326. This observation is no doubt correct, but it misses the point of defendants' and amici's challenge in the instant case. The problem with the government's construction of the statute and Guidelines at issue in this case is not that it might permit some unfair results because of "unanticipated loopholes" or "concealed irrationalities," but rather, that it makes punishment turn in every case on a factor bearing no rational relationship to culpability in any conceivable sense. There is an essential difference between a sentencing scheme that is arbitrary because of the inherent frailties of human nature and one that is arbitrary by design. The irrationality of the government's construction is pervasive and inescapable. While petitioners' may not have the right to a perfect sentencing scheme, they do have the right to one that is not fundamentally arbitrary. This is the core meaning of the Equal Protection of the Laws — the right to be free from the fundamentally arbitrary exercise of governmental power. If the government's construction of the statute and Guidelines is adopted in this case, those provisions must be invalidated in light of the Equal Protection component of the Due Process Clause of the Fifth Amendment.[19]

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[19] Alternatively, one could conceive of the right to be free from the arbitrary infliction of punishment as a right to be free from "cruel and unusual punishment" under the Eighth Amendment. See, e.g., Furman v. Georgia, 408 U.S. 249, 250 (1972) (Douglas, J.) (A penalty "should be considered 'unusually' imposed if it is administered arbitrarily or discriminatorily.") Whether one considers the right to be free from arbitrary governmental action under the Equal Protection clause or the Eighth Amendment, the analysis would be the same: one would have to determine whether the legislature could be said to have acted rationally, i.e., whether the legislative action bore a rational relationship to a legitimate governmental goal.

CONCLUSION

For the reason given above, amici urge this Court to reverse the decision below.

Respectfully submitted,

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